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IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

H. A. & L. D. HOLLAND COMPANY, a corporation,
Appellant,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Defendant.*

GEORGE TURNER and BERTHA TURNER, husband and wife, *Appellants,*
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Defendant.*

H. J. SHINN and PHOEBE SHINN, husband and wife,
Appellants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Defendant.*

W. H. KIERNAN and CHRISTINE B. KIERNAN, husband and wife,
Appellants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Defendant.*

No. [illegible]

BRIEF OF APPELLANTS.

Upon Appeals from the United States District Court for the Eastern District of Washington, Northern Division.

TURNER & GERAGHTY,
POST, AVERY & HIGGINS.
Solicitors for Appellants.

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STATEMENT OF THE CASE.

The above cases, being identical in the facts put in issue and the legal propositions involved, were

consolidated in the court below for purposes of trial. The practice on appeal in consolidated cases is left somewhat uncertain by the decisions of the Supreme Court and of this Court. A single appeal which treats the consolidated cases as one case for purposes of appeal, has been condemned, although the appeal in that form was sustained in the particular cases before the courts, by virtue of the principle of estoppel. In this posture of the law appellants thought it the best practice, or at least the safest practice, to prosecute an appeal in each case and to secure from the lower court in the order allowing the appeal, a direction that the papers on appeal in each of the cases be bound up together as one record, and that the testimony taken on the trial in the consolidated cases stand as the testimony in each case in the appellate court.

Upon the question of the form of the appeal, and the form in which the evidence should be sent up, the parties entered into two stipulations. The first was in open court at the commencement of the trial, and was as follows:

> "It is stipulated that all four of the above entitled cases shall be consolidated for the purposes of trial and of appeal, in case an appeal be taken by either side, each case, however, to be considered on its own merits, and the testimony offered to be applied to each case as the court may find it to be relevant, and a separate decree to be entered in each case as the equities of the case may require."
>
> "It is further stipulated that in case of an appeal by either of the parties, plaintiff or de-

fendant, that originals of all exhibits offered in evidence by either party shall be sent up instead of copies, and that such exhibits need not be printed as a part of the printed record."

(Record, pp. 218-219.)

The second stipulation was in writing and entered into at the time of the settlement of the evidence by the lower court, and was as follows:

"It is stipulated that the above and foregoing is an accurate condensation of the evidence taken in the above named consolidated cases, and together with the original exhibits, constitutes all the evidence taken in the said cases, and that the same may be approved by Court or Judge thereof; also that the said condensation, together with the originals of the exhibits, the pleadings in the cases, orders, judgments and decrees, and the several papers evidencing the steps taken to perfect an appeal, shall constitute the record on appeal in the several consolidated cases."

(Record, pp. 353-354.)

These cases grow out of the following state of facts:

On January 20, 1881, the Northern Pacific Railroad Company laid off and established on the north half of Section 19, Township 25 North, Range 43 E. W. M., being a section of land which came to it by the grant in aid carried by Section 3 of the Act of Congress of July 2, 1864, a townsite called Railroad Addition to Spokane Falls, and filed on said date and recorded in the Auditor's office of Spokane County, a map or plat of said townsite. On the map or plat a street called "Railroad Street," 225.7 feet wide, was delineated, with a single line of railway

track near the center of the street, two short switch tracks on each side of the main track, and a small depot building fronting the main track and enclosed within the two switch tracks. A copy of that plat, with all the writings thereon, and with the lots belonging to complainants, shaded in red, will be found at the end of this brief and enclosed within its covers.

The town was laid off and the plat filed in January, 1881. It was not until the fall of that year that the Railroad Company built its line into Spokane and over Section 19, although on the 4th day of October, 1880, it had filed its map of definite location in the General Land Office, showing its line extending over and through the north half of that section.

Immediately after the filing of the town plat the Railroad Company commenced the sale of lots in Railroad Addition, including the lots on each side of Railroad Street, conveying the same by deeds which described the lots by reference to the town plat, many of the lots abutting on Railroad Street being immediately built on with houses and business buildings fronting on Railroad Street. This course of conduct continued from January, 1881, until the fall of 1889, by which time nearly all the lots abutting on Railroad Street had been sold to the public and many of them had been built on. At the time of the great fire in 1889, the street, throughout its entire course, had been built on continuously, but not solidly, from end to end, but the street was more fully built on on the

north side than on the south side. On the north side two or more blocks were built up solidly with buildings facing Railroad Street. The buildings on the other blocks were scattering, but there was not a single block bounded by Railroad Street but had one or more buildings facing that street. This building up and establishing of Railroad Street, did not take place all at once, but it was a continuing process covering the period from January 20, 1881, to August 4, 1889. The Railroad Company not only sold the lots, fronting on Railroad Street, knowing they were to be built on with Railroad Street frontages, continuing that course of conduct for nine years, but during all that time it permitted Railroad Street to be used by the public as a street without protest, objection or interruption of any kind. At the time of the fire in 1889, Railroad Street was one of four or five principal streets of the town.

The agents of the Railroad Company in selling or attempting to sell the lots on Railroad Street, called attention to its great width and to the advantages accruing to lots abutting on it.

The fire of 1889 destroyed the buildings on Railroad Street along with those on all the blocks constituting the business part of the town, and for several years thereafter the town, now grown to a considerable city, was in a fever of activity in the process of rebuilding. The great mass of building material coming into the city, was unloaded by the Railroad Company on Railroad Street and kept there until

needed, the Company extended its depot buildings, closing some of the cross streets, and in a general way, and without much if any protest, obstructed Railroad Street and impeded it for travel.

At the end of this period, when order had begun to emerge from chaos, the Railroad Company conceived the idea of making Railroad Street a warehouse district. The lots on the south side of the street were first built up with warehouses, but none of these encroached on the street. One very small and insignificant wooden building was almost immediately placed in Railroad Street on the north side, in front of one of the lots on that side abutting Railroad Street, and there remained without protest from anybody so far as the evidence discloses. When the lots on the south side had all been occupied, and this condition was not reached for several years, the Railroad Company began leasing sites for warehouses on the north side of the street and within the limits of Railroad Street, leaving a sixteen foot alley between these warehouse sites and the north line of the street. These have been built on from time to time by the lessees, most of the building having been done within the last six to ten years, until at the time of the filing of the bills in this case, a large portion of the north side of Railroad Street was occupied with warehouses of various kinds extending from the north side of the street toward the center for from eighty to one hundred feet. There was left, however, an open space approximately 125 feet wide extending from these warehouses to the south line of the street, which has

never been obstructed except by railway tracks, and this open space had been travelled by the public, more or less, up to the time of the filing of the bills.

A few years ago, the defendant, which had succeeded to the rights of the old Railroad Company, conceived the further project of raising its tracks on Railroad Street by means of a dirt fill in Railroad Street, which would occupy practically all the open space left in that street by the then existing encroachments. This fill was designed, not only for the main track, but for switch tracks by means of which the warehouses on each side could be served through the second story. There was much contention as to why this was desired by the defendant, complainants insisting that it was for the purpose of improving the grade of the railway, and to enable the defendant to serve all the transcontinental lines in Spokane by transporting their heavy traffic over an easy grade through the heart of Spokane, and the defendant insisting that its only purpose was to separate its grade from that of the cross streets and thus safeguard life and property. It does not much matter which position was the correct one, and we leave that matter to the consideration of the Court on the evidence, if it shall see fit to look into it, still insisting that our position is the correct one. But whatever its motive, the defendant sought an ordinance from the city in 1908, requiring it to elevate its tracks on Railroad Street, and was then defeated of its purpose. It sought the same thing in 1912, and after much discussion, secured action by the City Council in line

with its wishes, the ordinance being mandatory in its command, but giving the defendant 45 days in which to accept the same, in default of which it was to be void.

Meantime the lots abutting Railroad Street, both on its north and south side, have been improved with valuable business buildings, costing many millions of dollars, all of which will be much injured and damaged by the closing of Railroad Street, and the operation thereon of heavy freight and passenger trains and switch trains at an elevation.

We do not stop at this point to refer to the record in support of the above statement of facts. Such facts therein as are controverted, and the only controverted facts, practically, are those relating to the establishment and maintenance of Railroad Street as a street, are discussed in the body of the brief with the necessary references.

The complainants, owners of property abutting on Railroad Street, alleged the above facts in substance in their bills, taking the position that Railroad Street was a street by both statutory and common law dedication, and prayed an injunction against the obstruction of the street by the structure which the defendant was then proceeding to build in the street pursuant to the ordinance passed by the City Council.

The answers set up that Railroad Street, as shown on the plat of Railroad Addition, occupied a

part of the right of way of the Railroad Company acquired by it under the second section of the Act of Congress, approved July 2, 1864, incorporating the said Company, and alleged that the Railroad Company was wholly without power to dedicate its right of way or any part thereof as a public street. They also alleged that Railroad Street as shown on the town plat, was and is by the said plat and the dedicatory and explanatory writing thereon, excepted from dedication as a street in whole or in part. They also denied that the Railroad Company threw Railroad Street open to the public use as a street, or that it was used as a street by the public with the knowledge and consent of the Railroad Company, and alleged that such use as was made of the street by the public was permissive only on the part of the Railroad Company. The answers alleged that in the proposed elevation of its tracks through the city of Spokane by means of the structure described in the complaint, it was acting in part under the duress and compulsion of an ordinance of the city of Spokane, requiring it to elevate its tracks through the city, and that it was also acting in the exercise of its inherent right and power to make such changes on its right of way as might be necessary for the proper operation of its railroad system. The ordinance referred to is set out as an exhibit to the answers. The answers also averred that the city of Spokane was a necessary party to the action.

SPECIFICATION OF ERRORS.

The appellants specify the following particulars in which they believe and aver that the court erred in rendering the decree in the said consolidated causes:

I.

In decreeing that the prayer of complainants' bills for a perpetual injunction be denied, and in dismissing the said bills and entering final decrees for the defendant.

II.

In not making, rendering and entering decrees in favor of complainants and against the defendant perpetually restraining and enjoining the defendants from committing the acts complained of in the bills and established by the pleadings and evidence.

III.

In finding and holding that Railroad Street, as described in the bills, was laid off and established on the right of way of the defendant company, acquired by its predecessor under section 2 of the Act of Congress of July 2, 1864.

IV.

In finding and holding that the Northern Pacific Railroad Company was without power to dedicate Railroad Street to the public as a street, because the same constituted a part of its right of way acquired

by it under section 2 of the Act of Congress of July 2, 1864.

V.

In finding and holding that the said Northern Pacific Railroad Company did not, in and by the town plat, filed and recorded by it, make a statutory dedication of Railroad Street.

VI.

In finding and holding that the said Northern Pacific Railroad Company did not, in and by its conduct, make and effectuate, a common law dedication of Railroad Street to the use of the public.

Stated shortly and concisely the questions presented by the pleadings and the evidence are as follows:

First: Was Railroad Street, in fact carved out of the right of way of the Railroad Company?

Second: Did the Railroad Company have power to dedicate a part of its right of way as a public street?

This is largely a question of law, although it is influenced to some extent, we submit, by the situation as it presented itself at the time the town plat was made and filed.

Third: Did the Railroad Company, in and by the town plat filed by it, in fact and in law, make a statutory dedication of Railroad Street?

Fourth: Did the conduct of the Railroad Company and the public, in the use of the street for a period of nine years, effectuate a common law dedication of that street to the use of the public?

Fifth: Did the ordinance of the city of Spokane, pleaded by defendant, justify the use and occupation of Railroad Street, by the defendant, if that street was in fact a public street?

This question was not pressed by defendant at the trial, the Court saying in its opinion:

> "If it is a public street it is conceded that the municipality could not give it over to the exclusive use and occupation of the Railway Company, and such would be the necessary effect of elevating the tracks according to the plan outlined."
>
> *State ex rel Schade Brewing Co. vs. Superior Court,* 62 Wash. 96.

Sixth: Is there legal force in the contention that the city of Spokane is an essential party to the litigation?

This contention, while not abandoned below, was not urged by the defendant, and it was not noticed in the opinion of the Court.

Complainants feel called on, however, to present their views on the two last questions, inasmuch as they are presented by the pleadings, and the trial in this Court is *de novo.* The defendant may or may not urge them here.

ARGUMENT.

First: Was Railroad Street, in fact, carved out of the right of way of the Railroad Company?

Complainants insist that the right of way was carved out of the street, instead of the street being carved out of the right of way. It is true that the Railroad Company filed its map of definite location on the 4th day of October, 1880, and that that map showed the line of railway to extend through the half section of land upon which Railroad Addition was platted, while the map of Railroad Addition was not filed and recorded for three months thereafter, to-wit: January 20, 1881. But the map of definite location, so far as it fixes the actual location of the track on the ground, is only approximate. The Company may change the location of its track from that laid down on the map of definite location and no one but the government can complain.

Northern Pacific R. R. Co. vs. Smith, 171 U. S. 268.

It may build its line without any map of definite location, and the right of way becomes vested as fully as if a map had been filed.

Stuart vs. Union P. R. Co., advance sheets, Opinions Supreme Court of U. S. (Oct. term 1912), April 1, 1913.

It is only the actual final survey, followed by actual occupancy for purposes of construction, that gives the right of way precision, and causes it to

relate back. Prior to that time it is only a present beneficial easement, having no precision.

Railway Company vs. Alling, 99 U. S. 475.

In respect to precision, the grant in aid of the building of the road, stands on a very different footing. That attains precision at the moment of the filing the map of definite location.

St. Paul & Pacific R. Co. vs. Northern Pacific R. Co., 139 U. S. 1.
Van Wyck vs. Knevals, 106 U. S. 360.
Kansas Pacific Railway Co. vs. Dunmeyer, 113 U. S. 629.

There can be found nowhere in any of the numerous acts of congress granting rights of way to railways any statutory criterion to determine when the grant of the right of way acquires precision. The reference in those acts to the filing of the map of definite location is wholly and entirely for the purpose of fixing the time when the grant in aid shall take effect. In the case of Jamestown and Northern R. Co. v. Jones, 177 U. S. 125, where the Court held that the title of the Railway Company to its right of way became perfect on the building of its road without the filing of any map of location, Mr. Justice McKenna said:

> "This conclusion does not conflict with the doctrine announced in Van Wyck v. Knevals, 106 U. S. 360, and in Kansas Pacific Railway Company v. Dunmeyer, 113 U. S. 629, that the title to lands passing under railroad land grants is established at the date of the filing of the map of definite location. The same question is not presented here. Different considerations apply to land grants than to the grant of the right of way."

It appears then that the Railroad Company, at the time it made and filed the plat of Railroad Addition, had full fee simple title to Section 19, Township 25 North, Range 43 East, of the Willamette Meridian, under the grant in aid, while its right of way was still a float, still a mere beneficial easement without precision. The full fee had vested under the grant in aid before there was any opportunity for the base fee of the right of way to attach.

Now in this posture of the law, what basis is there for the contention that the title of the Railroad Company to the land embraced in Railroad Street, must be referred to the grant of the right of way contained in the second section of the Act of Congress of July 2, 1864, rather than to the grant of the odd sections in aid of the road, contained in section 3 of that act?

It is true that the right of way grant, imperfect as it was, was yet not subject to any exception, while the grant in aid was subject to the exception that it attached only to lands "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims of right, at the time the line of said road is definitely fixed," but that difference shows no purpose on the part of congress to attach any peculiar force or effect to the right of way grant over the grant in aid, when the latter grant had met all the exceptions mentioned, and became fixed by the filing of the map of definite location. To be a little more explicit: Both grants were in praesenti; the right of

way grant, although a float until the road was definitely located, yet took effect from the date of the granting act as burdening every section of the public domain over which it might by any possibility be located between the two terminal points,—that is to say: After the date of the Act, no subsequent disposition of the public lands could relieve them of the burden of the grant; the aid grant, on the other hand, was subject to any disposition the government might make of the public lands covered by it up to the time of the filing of the map of definite location, but it became fixed and certain and beyond recall when that map was filed, as to all lands covered by it and not then disposed of. As to all such lands title took effect, by relation, from the date of the granting act. As to all such lands, such title as was conveyed by either of the grants, took effect as of the date of the granting act, and were equal in that respect. The most that can be said of either grant, and what may be said of one as well as the other, is that it took effect as of the date of the granting act. So that the fact that the grant in aid carried an exception of lands disposed of before the filing of the map of definite location, cannot be considered in derogation of the aid grant as to lands coming to the company under that grant and freed from the exception. And this is especially true, where the title under the grant in aid was designed to become a full and perfect fee, subject only to a condition subsequent, on the filing of the map of definite location, while the grant of the right of way would then still be a float, requiring

something more to give it precision, and when it had attained precision, title under it would still be a lesser title than that conveyed by the grant in aid. While it has been said, and with truth, that these grants to railway companies are something more than mere conveyances, and are therefore not to be thwarted of their purpose by a strict application of the learning applied to conveyances, there must be some evident policy in them to which that learning would run counter, in order to justify its displacement in their construction. Nothing of the kind can be found in the Act of July 2, 1864.

The learned Court below was in error in holding that "the grant of the right of way was an entirety and is held throughout by the same tenure and subject to the same limitations." Congress knew that its grant would not give the Railroad Company a continuous right of way, because it provided in Section 7 of the granting act for the condemnation of private property for right of way (13 Statutes, p. 369), which negatives any purpose that the Railroad Company should take a grant from the government of a right of way as an entirety, and hold it throughout by the same tenure and subject to the same limitations. In pursuance of this power of condemnation, it is to be noted, the right of way may be of any width necessary for the purposes of the Company not exceeding 400 feet. What becomes of the continuity of the 400 foot right granted by congress when the Company condemns a right of way through private property of 50 feet or of 100 feet? What also be-

comes of the identity of tenure and of limitations spoken of by the Court below, as to parts of the right of way acquired by condemnation? Manifestly those parts of the right of way are free from the reverter declared in N. P. Ry. Co. v. Townsend, 190 U. S. 267.

The Supreme Court of the United States, in the last named case, was considering the right of the Railroad Company in an even section, where the only basis of railroad title was the grant of the right of way conferred by section 2 of the granting act. It could not have declared the title to have been "a limited fee, made on an implied condition of reverter," if it had been dealing with an odd section, where both the right of way grant and the aid grant, concurred in conferring title. In such a case, on abandonment of the right of way, the full fee conveyed by the grant in aid, would intervene to prevent reverter. Since, then, it was within the contemplation of congress that the continuity of the right of way, held under the congressional grant, might be broken, in cases of condemnation, why not that it might be broken when the Railroad Company built over its own lands? In neither case could there be any reverter on failure of the condition annexed to the right of way grant, and it was the implied condition of reverter that influenced the decision in the Townsend case.

Suppose the Railroad Company after the filing of its map of definite location had constructed its

road, as it might have done, on the south half of Section 19 instead of on the north half, can there be any doubt that its dedication of every street in Railroad Addition, laid out on the north half would be held valid and free from question? The affirmative answer to this question necessarily carries with it the proposition that as to Section 19 the Railroad Company took title to every square foot of it by virtue of the grant in aid and not by virtue of the right of way grant. If the filing of the map of definite location showing the line through the north half of that section did not fix that line there, but did fix it for the purpose of the land grant, then, at the time the Railroad Company made and recorded its townsite, it had full fee simple title to every part of Section 19, unburdened by any condition except a condition subsequent, and might lawfully devote every foot of it to any public purpose it pleased, and its dedication of Railroad Street was valid, and the reservation of a right of way over the street was a carving of that right out of the street instead of a carving of the street out of the right of way.

This conclusion is enforced by a consideration of the nature of the two grants and of the rules of law applicable to them. The grant of the right of way vests a lesser estate in the land than the grant in aid. The former was the grant of "a limited fee on an implied condition of reverter."

N. P. Ry. Co. v. Townsend, 190 U. S. 271.

A limited fee is a base fee.

Cooley's Blackstone, Book 2, p. 109.

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out of ~~time~~ him.

Cooley's Blackstone, Book 2, p. 173, Marg. p. 175.

If then the Railroad Company took title to that part of section 19 embraced in Railroad Street under both grants, even if both attained precision by the same act, namely, the filing of the map of definite location, the lesser title merged in the greater.

Cooley's Blackstone, Book 2, p. 177.
Cyclopedia of Law and Procedure, Vol. 16, p. 665.
Black v. Elkhorn Mining Co., 49 Federal Rep. 553.

Under the doctrine of merger the greater title, relating back to the same point of time as the lesser, must have prevailed from the beginning.

Where A grants to B a right of way over a certain tract of land belonging to A, and by the same instrument conveys to B a part of the same tract in fee simple, and B, when he locates his right of way, over said tract, locates it in part over the land conveyed to him in fee, can there be any doubt that the right of way title over the land of B is merged in the fee simple title, and that B may discontinue the right of way entirely if he pleases or burden it in any way he may see fit?

This doctrine of merger would come in conflict

with the principle that these grants must be construed in a manner to effectuate the intention of congress, if any evidence could be found of an intention to require a continuous right of way to be held subject to the reverter declared in the Townsend case. But we have seen that the provisions of the act of 1864 negatives any such intention, and shows that, outside the even sections of the public domain, as to which a grant of the right of way was necessary, congress intended the Railroad Company to acquire a right of way of such dimensions as it pleased, and to be held by it, absolutely free from condition or limitation in favor of the United States.

There has been a disposition on the part of some of the courts in the past to apply legal principles with the utmost rigor in order to protect railway corporations from the just consequences of their own acts. Of that we do not specially complain. But when the application of plain legal principles will hold them to such consequences, we respectfully submit that fanciful considerations of public policy, which have no real foundation in the essence of things, or in any declared public purpose, ought not to be permitted to defeat a result so just and meritorious.

SECOND.

But if the Railroad Company took title under the right of way grant, did it have power to dedicate a part of its right of way as a public street?

This question we insist must be answered in the affirmative.

The identical dedication involved in this case has been held valid as to cross streets.

N. P. Ry. Co. v. City of Spokane, 56 Federal Rep. 916.

N. P. Ry. Co. v. City of Spokane (C. C. A.), 64 Federal 506.

The same thing has been held by the Supreme Court of the United States, and an intimation given broad enough to include longitudinal streets,—

N. P. Ry. Co. v. Townsend, 190 U. S. 267.

N. P. Ry. Co. v. Ely, 197 U. S. p. 1.

The doctrine of the Townsend case has been construed to authorize the condemnation of a longitudinal right of way for another railroad out of the right of way of the Northern Pacific right of way,—

North Coast R. Co. v. N. P. Ry. Co., 48 Wash. 529.

Also to authorize the application of the doctrine of estoppel against the Union Pacific Railway Company, claiming that a street, and other lines of railway than its own on the street, were illegally on its right of way,—

U. P. Ry. Co. v. City of Greeley, 189 Federal 12-13.

If the right to condemn a longitudinal right of way for another railroad out of the Northern Pacific right of way exists, certainly the right to condemn a longitudinal street out of the same right of way must

exist. A street is as important a public purpose as a railroad right of way, and the power of eminent domain must exist as well for the one purpose as for the other. And if the right of way can be condemned for the purpose of a street, against the will of the Railroad Company, the Company, of its own free will, can devote its right of way to that purpose. The power of condemnation, however, is not the measure of the power of dedication. The act of dedication is a conclusive declaration by the Railroad Company that the lands dedicated are not necessary for railroad purposes, except to the extent of the use reserved, something that a court might not feel justified in finding over the opposition of the Railroad Company. It may be said that whenever there is the right of condemnation, there is also the right of dedication, but it cannot be said that absence of the right to condemn also shows absence of the power to dedicate.

And if, as held in U. P. Ry. Co. v. City of Greeley, *supra,* a railroad company owning a right of way by congressional grant, similar in every respect to the grant in this case, can, by indirection, lose the right to complain of a street laid off on its right of way, why not by its solemn act in writing evidencing a deliberate intention to establsh the street? An estoppel by writing is certainly as efficacious as an estoppel *in pais.*

The fact that the fee of the Railroad Company

was conditional would not defeat the power of dedication,—

N. P. Ry. Co. v. City of Spokane, 64 Federal 509.
Mechem v. Seattle, 45 Wash. 387.
Elliott on Roads & Streets (3rd Ed.), Section 159.
13 *Cyc.,* p. 443-C.

Especially where the remainderman (in this case the U. S.), has consented to the establishment of streets over the public domain,—

Revised Statutes of U. S. (1878), Section 2477.

The case of N. P. Ry. Co. v. City of Spokane, decided by this Court and reported in the 64th Federal Reporter, at page 506, involved a consideration of the force and effect of the same townsite plat relied on by the complainants in this case, but only in so far as it involved the streets laid out across Railroad Street. The Railroad Company was then endeavoring to block those streets and put forward the absurd contention that it could not dedicate a public street across any part of its right of way. This Court had no difficulty in determining that contention against the Railroad Company. No doubt expressions employed in the decision of that case ought to be looked at in the light of the precise case before the Court. But it is difficult to discriminate, so far as necessary public uses are concerned, between a cross street and a longitudinal street. The necessities of a municipality will always require the latter. So that we respectfully submit that the decision of this Court in the case referred to is logically determinative of

this case so far as the present case involves the question of power. This Court, at the time it rendered its former decision, evidently intended to make it comprehensive, because it made no effort to guard its language so as to confine the force and effect of the decision to cross streets, but announced principles broad enough to cover public uses of every character.

Speaking of the right of way grant, it said:

> "Its only limitation was the implied one that the Railroad Company might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature, as to interfere with its duties to regularly and properly operate a railroad."

and again:

> "The nature of the right of way over the public lands which the railroad company obtained by the grant was not different from that it acquired over private lands by purchase or by condemnation proceedings, under the laws of the several states through which it passed. Whether the company acquired the fee to the lands covered by its right of way or not, no reason is apparent why it may not dedicate public easements *over* and across the same, and by its own act grant to the public all the rights which the latter might obtain by the exercise of its right of eminent domain. Of course, the railroad company could confer upon the public no greater estate than it possessed, and, in any view of the case, the dedication could not affect the reserved rights of the United States, whatever they might be. The public easement, so dedicated, is undoubtedly subservient to the exigencies of railroad use, and the public take the dedicated crossing subject to the inconveniences which may re-

> sult from the increase of traffic and transportation along the line of the road, and the possible necessity of laying more tracks thereupon; but the company, after such dedication, and after rights have been acquired thereunder, may not close up the street with a building, and may not say, as in this case, that because it is convenient to have a warehouse at this point, and because there is no place within the city so desirable for that purpose, it will revoke the rights which it has conferred upon the public by the dedication. One of the objects of congress in making the grant was to upbuild and develop the country through which the road was to pass, and it is in harmony with this purpose, as well as in line with the adjudicated cases, so far as they have approached the question under consideration, to hold that such public use is not inconsistent with or subversive of the railroad use, which was intended by congress."

The case decided by this Court, was the only case, we believe, involving the public use of a railroad right of way under congressional grant, before the Supreme Court of the United States when it was considering N. P. Ry. Co. v. Townsend, *supra,* and it was in view of the decision of this Court in the case referred to, and the comprehensive language used in that decision, that the Supreme Court felt called on to make the broad reservation found in the following extract from its opinion:

> "Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the

railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

The Federal cases, above referred to, clearly show that the right of way granted by the government may be devoted to public uses, and this Court has said that the only limitation was that the use must not be such as to interfere with the duty of the railroad company to regularly and properly operate a railroad.

It has also been held by the Federal Courts that a railroad company may burden its right of way, by its own contract, for private purposes, and *a fortiori,* it may burden its right of way itself, or submit to have it burdened by the public, for public purposes.

The extent to which railroad companies, including companies chartered by congress and having their right of way by congressional grant, may burden and hamper themselves in the use of their right of way, by private contract, is shown in:

Mo. Pac. Ry. Co. v. Nebraska, 164 U. S. 414.
Hartford Insurance Co. v. Chicago, etc., R. Co., 175 U. S. 99.
Chicago, R I. & P. Ry. Co. v. U. P. Ry. Co., 47 Federal 16.
Union Pacific Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564.

To which may be added from the state of Washington the following cases:

O. R. & N. Co. v. Owsley, 3 Wash. Ter. p. 38.
Seattle & Montana R. R. Co. v. Roeder, 30 Wash. 261.
State v. Superior Court, 46 Wash. 516.
Tacoma & Eastern R. Co. v. Smithgall, 58 Wash. 451.

The case of Chicago, R. I. & P. Ry. Co. v. U. P. Ry. Co., *supra,* is an illuminating case on this point. The railroad company in that case had burdened the use of its right of way by a contract whereby it gave another railway company the right to use its tracks for 999 years. It undertook to escape that contract by saying that the contract was *ultra vires* and beyond its power, and that contention was met by Judge Brewer, as follows:

> "Its obligation to the government is not to hold all its tracks or property beyond the use or touch of any other corporation. It goes no further than to retain such possession and use as will enable it to run all its trains and carry its passengers and freight. No monopoly of isolation from other currents of business is essential to this. It may do all the business which is offered, and still have a surplus use of its tracks. Can it be that its obligation to the government or the public compels it to let that surplus lie idle?"

Again:

> "I think it may be laid down as a general proposition that a corporation which, in the discharge of the duties imposed on it by charter, acquires property which it must have for its own uses, may, if there be a surplus use of such property, make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation."

The case was affirmed by the Supreme Court on the precise reasoning of Judge Brewer.

There is another feature of that case to be noticed. The defendant company said in aid of the plea of *ultra vires,* that it was impossible to foresee what its own demand on its tracks might be in the future of the 999 years during which the contract was to continue, to which Judge Brewer replied:

> "But again, the powers of a court of equity do not end with a day. If the changed condition of affairs 20 years hence shall make the full use of its tracks and other facilities necessary to the Pacific, for the transaction of its business and the discharge of its duties to the government and to the public, the powers of a court of equity are equal to the emergency, and can relieve it from the obligation of the contract; for the obligation of a corporation to not disable itself from the discharge of its duties is a continuing one, and all contracts which it makes endure only so long as their continuance does not create such disability."

The suggestion made by Judge Brewer is not that changed conditions *ipso facto* terminate the contract, but that changed conditions would authorize a court of equity to relieve against the contract, which action would, of course, be on condition that the party seeking relief do equity to the other contracting party. The Railway Company here, however, is not seeking to be relieved of its action, but asks the Court to declare that its action has never had any validity, and it claims the right, in its answer, to close Railroad Street and destroy it, from end to end, for all purposes, without making compensation to any person who will be injuriously affected thereby.

In this connection, we call attention to the lan-

guage of Mr. Justice Brewer, distinguishing between the doctrine of *ultra vires* as applied between corporations and their creators, and the same doctrine as applied between corporations and individuals and other corporations with whom the former has contracted:

> "The question as to whether a contract is *ultra vires* or not may arise in a controversy between the state and a corporation, or between the corporation and the party with whom it has assumed to contract; and it may well be that different rules of construction apply to the two cases: All grants, even grants of corporate franchises, are construed strongly in favor of the government, and against the grantee. So when the state challenges the action of one of its corporate creations, it may insist on clear warrant for such action. It may say: 'Point to the letter of your authority. I abide by my contract, and protect you in the rights and franchises I have given. Abide by your contract, and assume to do no act in disregard of the duties I have imposed, or beyond the authority I have conferred.' The rule of strict construction exists in such a case. But a milder rule applies when a corporation seeks to repudiate a contract into which it has formally entered. It is not seemly for a corporation, any more than for an individual, to make a contract and then break it; to abide by it so long as it is advantageous, and repudiate it when it becomes onerous. The courts may well say to such corporation: 'As you have called it a contract, we will do the same. As you have enjoyed the benefits when it was beneficial, you must bear the burdens when it becomes onerous, unless it clearly appears that that which you have assumed to do is beyond your powers.'"

Now we must accept the doctrine of the Townsend case that the Railroad Company could not

alienate the fee of its right of way or any part thereof to a private individual, but apart from that, we insist again that there is only one limitation on either a public or private use which may be permitted, and that is, that the use permitted do not disable the railroad company in the performance of its public functions. This does not mean that it may not inconvenience itself in one direction for corresponding advantages in another,—that it must at all hazards retain the power and the faculty of using and employing at all times and to its fullest capacity every foot of its right of way for every purpose for which future contingencies might make it desirable to use it. On the contrary it means and must mean, that it may limit or hamper itself by a permitted use which may seem to it to be in aid of its business, provided such use does not disable it in the performance of its public duties. Moreover, since it must act on matters as they arise, and in accordance with the advantages or disadvantages as they present themselves at that time, it cannot, if its action be found disadvantageous at a later period, be permitted to repudiate its action for that reason.

These principles seem the necessary corollary of the decisions referred to. Now let us apply them to the case in hand.

In 1881, when the railroad was built through Spokane, no one foresaw the splendid future of the town. It was a paper town the same as Cheney, Sprague and Ritzville, and the Railroad Company

made its dispositions in accordance with what its interests and the supposed interests of the town then seemed to require. In all probability it would never grow beyond a mere village, or at most, into a good sized country town. The Company's interests would be best subserved, as it then saw its interest, by a wide street on each side of its track, by which its customers could approach it and by and through which it might conveniently serve them.

Why was not that, as the matter then presented itself, a wise disposition to make? At any rate, was it not a reasonable disposition for it to make? It has proven so in the other towns laid off by it at the same time, namely, Ritzville, Sprague and Cheney, and to this day those towns are each served by a street called "Railroad Street," occupying the right of way, and which is the principal street of the town. Spokane, however, has grown beyond expectations, and it is found that the convenience of the Railway Company will be better subserved by repudiating the early action of the company, and now insisting that the street dedicated as a street is not in fact a street, but that it is a railroad right of way, in which the public can have no interest. Can the Railway Company now do that? It can if the Court shall find that Railroad Street was carved out of the company's right of way and that the early action of the company went to the extent of disabling it in the performance of its public functions. But it cannot if the Court shall find that, taking into consideration the situation at the time the action was taken, it was a reasonable use

of its right of way, and one promotive of the business of the company, and for the convenience of all concerned. In that case, mere present convenience and advantage ought to cut no figure. It is no doubt a great convenience and advantage to the company to establish a warehouse district in the center of the city, and to now turn Railroad Street into a switching yard, from which to serve the warehouses of its customers, but will the denial of that right, on the ground that the company dedicated its right of way for a street, subject to its own use of the same for railway purposes, disable it in the performance of its public functions? Manifestly not. It may inconvenience it, but that is a contingency which every railway company faces when it devotes any part of its right of way to public or private uses, in aid of its general functions, and a contingency which it must put up with when such devotion of its right of way clashes with its present convenience. It cannot be of the essence of the public duties of a railway company that it establish a switching yard on some one particular part of its right of way, or that it be permitted to establish a warehouse district in the center of a large city. It can always do those things elsewhere along its line, and thereby reasonably fulfill its public duties and functions. It is, however, of the essence of its functions that it maintain its right of way so that it may continue to operate its railway over and along the same. In the language of Hartford Insurance Company v. Chicago Railway Company, 175 U. S. 99, it may permit its right of way to be occupied, "so long as a free and safe passage is

left for the carriage of freight and passengers."

Aside from supposed limitations on the power to dedicate Railroad Street, found in the grant of the right of way, with which we have now dealt, there are a few state cases, some of them based on so-called public policy, and others on failure of the state to confer the power to condemn in such cases, against the condemnation of railroad rights of way for street purposes. This is mere matter of state policy. By virtue of the same policy, or because of the same failure in the condemnation laws, it is held in the same states that one railroad cannot condemn a longitudinal right of way out of the right of way of another railroad.

But as to the right to dedicate streets in rights of way, which is quite a different thing from the right to condemn, we cite,—

Elliott Roads & Streets (3rd Ed.), Sections 160 and 161 and authorities cited.

People ex rel. Field v. Eel River & E. R. Co., 33 Pac. 728.

So. Pac. Co. v. City of Pomona, 77 Pacific 929.

We also insist that North Coast R. Co. v. N. P. Ry. Co., 48 Wash. 529, establishes a state policy, even in cases of condemnation, which would authorize condemnation of a railroad right of way for a street, and that that decision is binding on this Court in this case.

THIRD.

Did the Railroad Company, in and by the town plat filed by it, in fact and in law, make a statutory dedication of Railroad Street?

The answer to this question depends on whether the dedicatory language attached to the plat constituted an exception of the soil of Railroad Street from the dedication, or whether the plat and dedicatory language together effectuated a dedication of that street with reservation of the right to use it for railway tracks and other uses.

The language employed was "the streets shown upon said plat are dedicated to be used by the public until lawfully vacated, except the strip of land 225.7 feet in width designated as Railroad Street which is reserved for the tracks and use of said Railroad Company."

This language standing alone might create either an exception or a reservation, although the only word in it having a technical meaning in the law is the word "reserved." But the words "reserved" and "excepted" are so frequently employed interchangeably that the courts, in determining their effect, look at and follow the intention of the parties. An attempted reservation is construed as an exception, and an attempted exception as a reservation, when to do so will effectuate that intention. This is elementary law, but we cite in its support:

13 *Cyclopedia of Law and Procedure,* p. 672, 3 and 4, and p. 677.

Words and Phrases Judicially Defined, Vol. 3, p. 2542, et seq.
Byles v. Tacoma O. & G. H. R. Co., 5 Washington 509.
Bridger v. Pierson, 45 N. Y. 604.

In the case last cited the Court quotes from the decision in French v. Carhart, 1 Comstock, 96, as follows:

> "Too much regard is not to be had to the proper and exact signification of words and sentences, so as to prevent the simple intention of the parties from taking effect. And whenever the language used is susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into; the situation of the parties and of the subject matter of the instrument. To this extent, at least, the well settled rule is that extraneous evidence is admissible to aid in the construction of written contracts."

Pursuing, now the course laid down by these authorities, it seems hardly necessary to do more than look at the plat alone to find conclusive evidence that the dedicator intended to create and establish Railroad Street as a public street.

Throughout the entire length of the street on the south side, none of the lots platted, except corner lots, have any means of access except by and through Railroad Street. They have no street frontage unless Railroad Street be a street. This fact was noted by this Court when the case involving the cross streets was before it, and it is a fact so significant as to be almost if not quite controlling. Is it possible that the dedicator expected to sell to the public lots hav-

ing no means of ingress or egress, and when it platted and sold lots fronting on Railroad Street, and having no other means of access, is it possible that it did not intend the public to understand that that means of access would remain open to them for all time?

The street is marked in large letters "Railroad Street." Why call it a street if it was not in fact intended to be a street? It is impossible to assume that as capable and reputable a business man as General Sprague would have called it a street if he had not intended that it should be a street, especially when the situation of the lots to the street is considered and when it would have been so easy to call it by any other appropriate name, if it was not, in fact, intended to be a street.

Lastly, the dedicator went out of its way, in the legend on the plat, to show the width of Railroad Street, there coupling it with other streets, and again calling it Railroad Street. This was unnecessary, and was further misleading the public, if the street was not intended to be a street.

The Court below said "there is no magic in the use of the word street," and the statement might be correct if the intention of the dedicator was otherwise plain and clear, but where the intention is obscure, as in this case, to take the view most favorable to the dedicator, there is great significance in the use of the word. Town lots fronting on Railroad Street, and having no other means of access, would not have been

saleable if, instead of calling the street a street, the dedicator had called it Railroad Reserve, or some other equally appropriate term to indicate that it was not in fact a street.

But there was significance in the use of the word street for another reason. The prominent features of a town plat are the lots, blocks, streets and alleys shown on it. The dedicatory language is generally in fine script off in one corner. Moreover, this language is rarely reproduced in the lithograph copies of the plat struck off for the use of the public and of agents employed to sell the lots to the public. Outside the official plat at the court house in Spokane, there was no record of the dedicatory language attached to the plat of Railroad Addition, and it is doubtful if any of the purchasers of lots in that addition ever saw or heard of any reservation or exception of Railroad Street to the uses and purposes of the Railroad Company. For these reasons, the Courts, as the cases hereinafter cited show, attach the utmost importance to the use on the face of the plat of the word "Street," "Park" or other designation, which indicates that a particular sub-division of land marked off on the plat, was intended to be dedicated to public use.

The situation of the subject matter, and the circumstances surrounding the transaction, all confirm the deductions drawn from the plat itself. Spokane was a paper town in 1881 with not to exceed two hundred and fifty people. There was no conception in

the mind of anybody of its future growth. That the use of Railroad Street for railroad purposes would ever exceed the use indicated on the plat, nobody ever thought for a moment. The Railroad Company owned the odd sections of land in and around the town, and desired to make its property attractive to purchasers so that it might sell the same and replenish its depleted coffers. It thought it might do as it pleased with the land. Its officials were not conscious that there was any limitation on the power of disposal, as evidenced by the fact that 175 feet of the so-called right of way, was platted into town lots and sold to the public.

The Railroad Company executed and acknowledged on the same day as that on which it executed and acknowledged the town plat of Railroad Addition to Spokane Falls, town plats of Cheney, Sprague and Ritzville, towns to the west of Spokane. Each of these plats had on it a wide street called Railroad Street, with the tracks of the railway in the center of the street, and the dedicatory language on each of the plats was identical with that on the plat of Railroad Addition. The evidence shows that the Railroad Street in each of those towns is maintained as a street to this day.

See Plaintiffs' Exhibits 5, 6 and 7. See also, testimony of George F. Christensen, p. 240; of John I. Melville, p. 242; of Martin J. Maloney, p. 245.

More than that,—Prior to the making of the plat, General Sprague visited Spokane and talked

with Mr. Browne, owning land to the west of Section 19, and desirous of platting the same, about plans for platting both tracts, so that the streets of each tract would join at the intersection and extend through each tract, and it was then agreed between them that the Railroad Company should lay off Railroad Street and that Browne should plat a similar street to be called by the same name as a continuation through his tract to the west. When Railroad Addition was platted, Browne, pursuant to the understanding with General Sprague, platted his addition and laid off Railroad Street through it, joining it to the Railroad Street of Railroad Addition on the east, and making it of the width of 200 feet.

(Record, pp. 290, 291 and 292.)

This fact was established in the former case before this Court, and was noticed in the opinion in that case,—

64 *Federal Reporter,* p. 507.

The fact was also established in Northern Pacific Railway Co. v. Ely, and was noticed in the opinion of the Supreme Court of the United States in that case, and in a manner to indicate that the arrangement made by General Sprague, and carried out by the dedication of Railroad Street, was unobjectionable in the view of the Court.

197 U. S. p. 1.

In view of these facts how can there be any possible question that the Railroad Company intended Railroad Street to be a street?

We now go a step further.

Where a town plat is ambiguous it must be construed, like a deed, most strongly against the dedicator, and in such cases the practical construction put upon the plat by the dedicator and the public, if in favor of the public right, is controlling.

Elliott on Roads & Streets (3rd Ed.), Section 131 and authorities cited.

Florida & East Coast R. Co. v. Worley (Florida), 38 Southern Reporter 618.

City of Alton v. Ill. Transp. Co., 12 Illinois 38.

The cases last cited sustain the propositions stated, and also show the significance attached to the plat itself as opposed to contradictory writing thereon.

Proceeding now to apply the principle last stated, complainants respectfully insist that if the case were devoid of any other feature, the practical construction put upon the plat by the Railroad Company and the public for nearly ten years, shows that it was the intention of the Railroad Company, in and by its plat, to dedicate Railroad Street as a street.

The Railroad Company immediately began to sell the lots and to convey them by reference to the plat. At the time of the great fire in 1889 all the lots on the north side of Railroad Street and most of those on the south side had been sold and so conveyed.

See Plaintiffs' Exhibit 11.

The agents of the Railroad Company in making

sales and attempting to make sales of lots on Railroad Street, called attention to that street, and remarked on the advantage of lots abutting on it.

See testimony of J. E. Gandy, Record, p. 219.

Testimony of H. J. Shinn, Record, p. 235 and 236.

Immediately after the filing of the plat, Railroad Street was thrown open to the public, business houses and residences were built fronting on the street on both sides of it, on lots sold by the Railroad Company, none having any means of ingress or egress to their front entrances except by and through Railroad Street, and those which were on the inside lots on the south side of the street, having no means of ingress and egress to any frontage at all except by and through Railroad Street, unless the 16 foot alley on which they abutted at the back can be considered a means of ingress and egress. At the time of the fire, the street upon both sides was so built upon in every block, and several blocks on the north side were built up solidly with hotels and business buildings having no frontage except Railroad Street.

During that period, to-wit, from January, 1881, until August, 1889, the space between the interior lines of the street, as shown on the plat, was used by the general public as a street as freely as any other street in the town. At the time of the fire Railroad Street was one of four or five principal streets. Never at any time was there any attempt on the part of the

Railroad Company to obstruct the use of the street or any intimation given by it that Railroad Street was not as much a street as any other street in Railroad Addition.

The testimony on the subject is really all one way. The only discrepancy between the witnesses for complainants and those for defendant, was as to the extent to which Railroad Street was used prior to the fire.

Dr. J. E. Gandy testifying on that subject said:

"It was used as the principal driveway to and from the passenger depot from the down town district, which was then on the corner,—the business district was then on lower Howard Street from Front Avenue south, a block and a half probably. It was used as much as any street in town, except possibly Howard Street and possibly Front,—that is, talking now of the early history prior to the beginning of 1883 and 1884. It continued to be a used street, much used street, up to the time of the fire, the big fire in August, '89, August 4th, 1889. That fire swept away everything on Railroad Street east of Lincoln Street. Lincoln Street was the west line of the fire. At the time of the fire Railroad Street, on the north side was nearly all occupied by buildings from Lincoln Street east and Monroe Street east until you got up to Howard Street, and some on Howard Street and Railroad. The buildings were generally wooden buildings and most of them one story. One or two of them were two story buildings. On the

south side of the track there were not so many buildings."

Record, pp. 221, 222.

"Compared with Front and Main Streets, well in the early history Front and Main were much more prominent than Railroad Street, that is from 1880 up to the next two or three years. But as time went on Front became less and less used, Railroad more and more used. Up to the time of the fire Front Street had become principally a second class street, while Railroad had improved very materially in that five or six years. There was a Hotel called the Sprague Hotel on Railroad Street, built by a man named Kinsell. It stood on the west side of Post on the first two lots, and it fronted south on Railroad Street. It was burned prior to the big fire. It and the California House were the two best houses in town. The Sprague House was a fine Hotel, and it was recognized as one of the finest hotels in the upper country."

Record, p. 223.

"Up to the time of the fire there was never any interruption of the use of Railroad Street by the Railroad Company that I remember of. Never heard of any objection. There were no obstructions of any kind in the street, except the tracks and the railroad depot. At the time of the fire Spokane had grown to be several thousand, ten thousand probably. I don't remember. There were sidewalks on Railroad Street. I remember building a sidewalk in front of my own

lot where Railroad Hotel was. I don't remember much about the sidewalks. I know I had to put down one in front of my fifty feet and I know there was sidewalks clear across that block. Don't remember much about sidewalks further east or west. There were hitching posts in front of my building opposite the depot, just on the edge of Railroad Street. The street from Monroe on the west to Washington on the east, six blocks, was used for traffic."

Record, p. 225.

On Cross Examination:

"On the south side people just drove along there promiscuously, either on the right of way or on the north tier of blocks where there were no buildings. When I talked about them traveling the street I was talking of travel north of the track. On the north side of Railroad Street the north end of the lots were rocky. The south ends were generally smooth. These lots were built on very early. People did not drive along there promiscuously, there was a well defined roadway close to the railroad track, not right close to it, it was between our building and the track. I am referring now to all the blocks west of 12, west of 12 as far as Madison or Jefferson. There was a well defined roadway from Howard Street west to the depot. It came up to the extreme end of the lots. The driveway wasn't so well defined after you got west of the depot."

Record, p. 229.

We have quoted Dr. Gandy's testimony at some

length, because when the next succeeding witness was beginning to testify about the same matters, the Court, with a view no doubt of abridging the testimony as much as possible, asked counsel for defendant the question: "To what extent does the defendant dispute the testimony of J. E. Gandy," to which Mr. Graves replied: "I haven't any reasonable doubt that Dr. Gandy has told things approximately as they were. He has got his dates a little confused. Of course we will show that the tracks were increased. We will show by subsequent maps the increase of tracks. But I have no doubt there was a kind of general travel the way he states."

The same facts testified to by Dr. Gandy, but of course with some variation and with additional incidents, were testified to by H. J. Shinn, Record, pp. 232 to 236; Lucius G. Nash, pp. 247 to 249; Frank Johnson, p. 250; W. S. Norman, pp. 254 to 258; M. S. Bentley, p. 262; Rufus Merriam, pp. 265 to 266; D. M. Drumheller, pp. 269 to 270; J. B. Blalock, pp. 271 to 272; Thomas Thwaite, pp. 273 to 274; George Turner, pp. 274 to 279; C. J. Craig, p. 286; H. A. Holland, pp. 287 to 288.

H. J. SHINN:

"I have driven over this street a great number of times; it was universally used by the pubilc. I never heard of any obstruction to public use prior to the fire; never heard of any objection by the Railroad Company prior to the fire; never saw any signs or warnings against its use. * * * The travel was

straight up and down Railroad Street on either side of the track. The principal travel was between Howard and Lincoln, which were the only streets graded. * * * They generally followed the line of the railroad. They might be on the street line of the lots or might be on the street line of Railroad Street, but they were never liable to be off the right of way because that was graded. I wouldn't call it graded, but it was smoothed off so that you could drive along."

LUCIUS G. NASH:

"I am familiar with Railroad Street as laid out on the plat of Railroad Addition. That street was constantly used from 1881 to the time of the great fire in 1889. It was used by the public as a thoroughfare. I never heard of any objection to its use on the part of the Railroad Company. There were no signs warning the public off; nothing of that kind in those days. They commenced building on this street in 1881. * * * The south side of the track was mostly given to residences; and on the north side of the track, clustering around the depot, business houses sprang up there quickly, and parallel with the railroad was a well beaten road used by everybody—on both sides. * * * I have ridden over it many many times as a boy. Railroad Street on both sides was used habitually by the public as a street; that is all there is to it. * * * By the time of the fire in 1889, it was built on continuously through from Washington to Lincoln Street. I don't mean to say

it was solidly built up between those limits, but continuously."

FRANK JOHNSON:

"It has been used continuously, considerably by the public, as a thoroughfare; was even before I built this depot, because it was a well beaten road at that time. It was used on both sides of the track, but of course was used more on the north side than the south side. Up to 1889 it was built on in some blocks almost solid, in other blocks it was scattering. It was more fully built up on the north side. * * * By 1889 I should say the north side was continuously built up between Post and Mill. Some buildings had sidewalks and before others there were cinders. * * * The buildings I refer to all faced on Railroad Street."

W. S. NORMAN:

"When I came to Spokane in 1884, the north side of the track was an important street, as in all these towns, for small businesses such as hotels. I stopped at the Sprague House, which was on the corner, fronting on Railroad Street. * * * Up to the time of the fire Railroad Street within the limits I have described, had been used as a public thoroughfare by the public generally, and has been used ever since, in a confined form. Until a few weeks ago there was a roadway about sixty or eighty feet wide, between the service track to the warehouses and the main track."

On Cross Examination:

"The public got the understanding that Railroad Street as shown on the map was a pubilc street from the fact that the buildings all faced the street and business was transacted there."

M. S. BENTLEY:

"In 1882 it was a street the same as the others. It was a street of the city, and was built on to some extent at that time. At the time of the fire in 1889, the north side of the street from Howard was pretty well built on. Then down below Monroe Street there were scattered houses pretty well down to where Browne's Addition starts. Up to 1889 there was never any obstruction to the free use of Railroad Street by the public, and I never heard of the Railroad Company making any objection to its use. I never saw any notices informing the public that it was not a street. With the exception of the depot and tracks it was unobstructed."

RUFUS MERRIAM:

"At the time I came here the north side of the street between Lincoln and Howard was pretty well built on by wooden buildings. On the other side there wasn't so many, but I think there were some warehouses on that side. The buildings on our block 14 did not face on Railroad Street; they faced Howard. The Todd Bottling Works on the opposite side of the street from us had a frontage on Railroad Street. During that period the street was pretty gen-

erally used from Lincoln or Monroe on the west to Stevens on the east. There were no objections whatever to the use by the public on the part of the Northern Pacific Railroad Company or anybody else. I never observed any signs or warnings against its use. There were no obstructions in the street up to the time of the fire."

D. M. DRUMHELLER:

"As to the condition of Railroad Street from the time it was platted down to 1889, practically all the travel and traffic from the main part of town went down Howard Street to the track and then down Railroad Street to the depot, backwards and forwards. The street was built on on and off from 1882 up to the fire. I don't know how many buildings there was. Each block was quite fully covered. I remember one block, Post and Lincoln, on the north side, that was practically covered with buildings of different kinds. On the south side, I don't remember any but two. As far as I know the general understanding was that Railroad Street was a street. It was always considered a street. We always designated it as a street and understood it as being a street. I never owned any property on this street. I don't remember that there was ever any obstruction to the use of the street before the fire except that at one time the railroad company attempted to block up Mill Street, but it was stopped. The railroad company never interposed any objection to the use of the street to my knowledge."

J. B. BLALOCK:

"It was used by the public generally as a highway up till 1889, and was built on from Monroe pretty much up to Howard Street, probably five or six blocks, I should think. * * * The general understanding and repute in the city as to Railroad Street was that it was a street the same as any other. There was lots of travel on it, there was business there. * * * I cannot say how many streets were more important than Railroad Street in 1889. Riverside Avenue and Howard Street were of more importance; I don't think that Main was of as much importance as Railroad Street, nor Front. I think Railroad Street had more business on the north side than there was on either side of Main Street, but taking both sides of Main Street, I suppose it had more business than Railroad Street. Up to the time of the fire in 1889, I don't think that Railroad Street was obstructed in any way other than by tracks and the depot. There was no attempt on the part of the Railroad Company to obstruct or prevent the travel on the street during that time."

On Cross Examination:

"By the importance of a street, I mean the amount of teams and vehicles and traffic that went over it. There were sidewalks on the north side of Railroad Street at the time of the fire. The sidewalks were in front of the business houses in the block below Post, I guess, I mean west of Post. This was built up solid with business houses. * * * I get the

impression that it was a public street and that there was a public belief that it was a street from the fact that it seemed to be used much. I don't remember just when, but I know it was said a long time ago it was dedicated as a street, that was also reported, yes. These two things put together made people think that it was a street."

THOMAS THWAITE:

"I was familiar with the condition of Railroad Street from 1884 to 1893. I had occasion to use that street in my business during that time. * * * They all used Railroad Street,—it was a street then. It was built on—had quite a few buildings. In 1889 it was all built on between Post and Lincoln, but not so much between Howard and Post; but there were some houses there; some few buildings there, stores. I am speaking of the north side. There were not many business houses on the south side, that I can remember. Taylor and Sharkie were there and Henry Brook, but I didn't go up there very much. As to the general character of the buildings on the streets: They were one and two story buildings, used for lodging houses. I think there was a hotel, a lunch counter, and I think a couple of saloons—two or three saloons, and a fruit stand. I don't remember that the street was obstructed in any way in 1889. I never heard of any effort made by the railroad company or any of their agents to prevent the use of the street by the public during any of that period. The

street was generally used from Stevens to Jefferson Street. * * * There were sidewalks in front of the business houses, and hitching rails to tie horses to."

GEORGE TURNER:

"When I came here in 1884, Railroad Street was built on to some extent on both sides. I remember very well the first building that I saw when I got off the train was the Sprague House. It stood facing Railroad Street, and there were more or less of business buildings on the north side of the street, and, as I remember it now, I think there were some buildings on the south side, although very sparse. The street was then being used by the public as a street, that use and the condition of buildings on the street continued up until 1889, at the time of the fire. At that time the north side was pretty well built up. * * * I know that it was pretty well built up from about Lincoln Street up to the neighborhood of Howard Street. Railroad Street was then used generally by the public as a thoroughfare as well for reaching the depot, which was down on Post Street as in reaching these buildings on each side of the street, for the purpose of ingress and egress, and also for the passage of vehicles east and west off Railroad Street."

On Redirect Examination:

"It has only been of late years—the last six to ten years—that they have undertaken to occupy the entire north side of the street to the exclusion of the

property fronting on the street. There never has been any obstruction at all on the south side, other than the railroad tracks on the south side of the street. That has always been open for travel, so far as it can be travelled consistently with use of the railroad tracks, and my recollection is that there has been only one switch track to the south, certainly so in the blocks between Stevens and Mill Streets, and possibly further west, leaving the entire width, almost, of the street there for public travel; and that is the case up to this time. The south side of the track, for the purpose of light and air and access, has been open continuously all the time, and is open at this time."

On Recross Examination:

"When I say the rest of the street on that side (the south side) has been opened, I mean that it has been opened in the sense that it has been left there for public travel if anybody wanted to travel it. It has never been occupied with anything, and has been traveled, and I have traveled it myself."

C. J. CRAIG:

"From 1882 to 1889 the street was generally used as a street, that was principally used by people coming from Browne's Addition into the city here. I used it nearly altogether. I would come up Railroad Street and then take a cross street to go down town. I used to see the other residents coming the same way frequently. The north side of Railroad Street was pretty well built on. There were a few houses on the south side. We didn't use Railroad Street very

much after the fire. The whole city was burned up and we traveled most any way. Up to the time of the fire, Railroad Street was not obstructed in any way, except by the tracks and the depot. There was no effort to prevent the public from using the street."

The only witnesses called on the part of the defendant who testified with reference to Railroad Street, were:

A. A. Newberry, Record, pp. 312 to 315; Francis H. Cook, pp. 316 to 318; Samuel Glasgow, pp. 318 to 320; C. G. Carpenter, p. 324; Edward C. Miller, pp. 341 to 343.

A. A. NEWBERRY:

"It is very difficult to tell in detail as to the settlement south of the track in 1883. I am a little cloudy about where the buildings were. My recollection is that what buildings were south of the track began fronting on Second Avenue, or Second Street as it is called here. There were a few residences, I think, one near Monroe, that fronted the other way. * * * Going to the north side of the track prior to 1889, the Sprague House stood at Post, between Post and Lincoln, possibly in block 16. There were two or three little buildings between the Sprague House and Lincoln Street. My recollection is that Dr. Gandy owned them. There was a small saloon and I think a restaurant there. Thirty years ago is a good while to remember back in detail. * * * As to travel along the railroad right of way during

the year 1883 and along there to 1889, anybody went pretty near anywhere they wanted to; they traveled along the right of way and whenever the cars happened to stop to discharge freight or anything of that kind they would drive up to them. It was not a graded street or anything of that kind, but we never followed any street when we came from down town going home. I think the Sprague House had a sidewalk in front of it and the building upon block 18 had a sidewalk in front also. As to travel on Railroad Street between 1883 and 1889, I don't recall that it was any more of a street than a great many of the blocks were."

On Cross Examination:

"I can't recall any hotel on the north side of Railroad Street, but the Sprague House. Might have been more. I think there was one west of that, but I am not positive. I can't answer as to the number of saloons. I can't recall what merchandise stores there were on the street. I wouldn't say there were not any. There were some agricultural implement people, something of that kind, before the fire, I recall. * * * It was a good while ago. I am pretty hazy as to the buildings that were on either side of the track."

FRANCIS H. COOK:

"I was familiar with Railroad Street. I don't remember that I ever heard it called by that name. We sometimes called it Railroad Avenue. I think it was to designate the vacant spot between First

Avenue and Second Avenue; that is my idea. * * * There was hardly anything in the way of improvements. This was right after the plot was laid out. From that time to the fire we traveled most anywhere. There wasn't any obstruction anywhere over the country. * * * The depot was west of Howard. We went where there was no resistance, and went that way up to the time of the fire, but not very much. At that time I had no business with the rest of the town. I was really a farmer. I remember the Sprague House. I don't recollect much about the street, but I remember the Sprague House."

On Cross Examination:

"There may have been buildings on the north side of the track between Stevens and Howard, but I don't recall to mind any. There may have been some between Howard and Mill, and between Mill and Post, and Post and Lincoln. I think there were buildings between Lincoln and Monroe. I guess those that were built, if they did not face the side streets, had to face the track if they were going to do any business. * * * I know people could drive parallel with the track, and did drive there for several blocks, within a space of 100 feet of the railroad track, something like that."

SAMUEL GLASGOW:

"As to the condition of the right of way from the time I came here in 1885, there were no streets; you could drive anywhere except where the rails were laid. There were really no streets; didn't know

where the streets were. * * * Between 1882 and 5 the railroad right of way had some warehouses on it on both sides. * * * The right of way was not used by the public in general unless they had business on the railroad track; that was what we used it for. * * * I remember a saloon immediately across from the old Northern Pacific depot about a hundred feet or more from it. I don't remember a hitching post. I remember a couple of little buildings beside it. I remember the Sprague Hotel."

On Cross Examination:

"Before the fire there were some buildings on the track on Railroad Street between Howard and Mill fronting on Howard. There were some buildings on the north side between Post and Mill Streets, facing the track. There were buildings between Post and Lincoln Street on the north side. I don't know that they faced the track, they might. * * * I guess there were some excuses of cinder sidewalks on both sides of Railroad Street on Post; I guess that was the custom of the section men. * * * Anybody could drive along there from Howard to Lincoln. * * * There was a hide and fur depot in there; Behrend built that very early; I think 82 or 3. I think Taylor and Sharkie's place fronted on Howard Street, but can't swear to that. Looking at this picture (Defendant's Exhibit 30) I think it faces north. The fur depot referred to was on the north side of the track near Monroe."

C. G. CARPENTER:

"I came here in 87. At that time facing the depot there was a restaurant and saloon and I think they had some rooms upstairs, and some lodging houses in there, four or five buildings. That was in the block facing the depot. I don't think there were any sidewalks. * * * They could drive most anywhere. I don't remember whether they did or not."

EDWARD C. MILLER:

"First came here in 1881. * * * Came back here in 1884. Railroad Street in those days was used on both sides as a thoroughfare, people driving back and forth, going either west or east to the freight depot or passenger depot. The cars were left on the track to unload. As to the condition relative to driving down town, they could come up Post Street and cut across there near the Pacific Hotel, cut right across there at that time as it was all vacant, if I remember. * * * Other people besides those going to the depot could use it if they wanted to; could go anywhere they wanted to. Prior to the fire north of the track there was a small barber shop, restaurant and lodging house. South of the track was a string of residences, grocery stores, from Howard Street clear down to Monroe. They were way south of the track. * * * On the north side of the track across from the depot there was a saloon on the corner; next to that was a restaurant, then a barber

shop, then a restaurant. They got burned down at the fire."

It will be seen from the foregoing review of the testimony that there is practically no conflict as to the extent to which Railroad Street was improved at the time of the fire in 1889, although the recollection of some of the few witnesses for the defendant on that point is somewhat dulled by time. Nor is there any material conflict as to the character and extent of the travel on it. Two or three of the witnesses for the defendant, recollecting the early days, before there was much building anywhere, when it was the custom to cut across lots, thought that was the kind of travel to which Railroad Street was subjected. But if in 1889 Railroad Street was built on continuously, on both sides, although not solidly, except in certain blocks, and the testimony is overwhelming to that fact, it is putting too much of a strain on the credulity of the Courts to ask them to find that the travel on Railroad Street was of the cross lot variety. We insist in closing this branch of the case that the testimony establishes overwhelmingly a practical construction of the town plat in this case, on the part of the Railroad Company and the public, to the effect that that plat did dedicate and was intended to dedicate Railroad Street as one of the public streets of Railroad Addition to Spokane Falls. The finding of Judge Rudkin that the testimony on this branch of the case was consistent with an exclusive right of the Railroad Company in Railroad Street, was erroneous and cannot stand against the clear and convincing

implications of the testimony.

The defendant, in answer to this branch of complainants' case, presented to the Court below a line of authorities to the effect that an attempt to single out and reserve a right of way already in existence over land conveyed, must be construed as an exception, because a reservation must be of some new thing issuing out of the thing granted.

The principle was stated thus in Whittaker v. Brown, 46 Pa. St. 197:

> "Thus it appears upon sufficient authority, that words of reservation may operate by way of exception, and to have any effect, must do so when the subject of the reservation is not something new created, as a rent or other interest strictly incorporeal, but is a thing corporate and *in esse* when the grant is made."

The argument founded on these authorities was that the Railroad Company owned a right of way over the north half of Section 19 before it made its town plat; that that was something already in existence when the town plat was made; and therefore, that that part of the dedicatory language of the plat referring to Railroad Street, must be construed as an exception rather than a reservation, because it was not a new right carved out but an already existing right which it was the intention to save and preserve.

To what extent these authorities were persuasive in inducing the holding of the Court below that the dedicatory language of the plat created an exception

and not a reservation, the opinion does not disclose. The authorities will no doubt be again presented in the brief of defendant, and that imposes on us the necessity of dealing with them in advance of their presentation and exposition. Without questioning the correctness of the principle or its proper application in the particular cases, we say it has no proper application in this case.

First: If we are right in the first proposition advanced in this brief, the Railroad Company owned the fee of the land embraced in Section 19, and the right of way attempted to be reserved over it was in fact a new right.

Second: The cardinal rule in all cases is to give effect to the intention of the parties, and the rule of construction in the cases referred to founded on the nature of a reservation, did give effect to that intention. But here the application of that rule would have a contrary effect. If the Railroad Company did not in fact own section 19 in fee it believed that it did, and the town plat was made on the theory that it could deal with that section of land and every part of it as the absolute and unqualified owner. Now where the parties deal with land on the theory that the grantor owns it all in fee and the intention is that the land itself shall pass by the grant with a reservation to the grantor of some new right issuing out of it, it would be to defeat the intention of the parties instead of effectuating it, to permit the grantor to say at a later period that the right attempted to be re-

served existed in him before the reservation and that the latter must therefore be construed as an exception.

> "Though 'exception' and 'reservation' have been used promiscuously, it is well settled that, in giving construction to instruments, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated."
>
> *Winthrop v. Fairbanks,* 41 Maine 307.

> "Under our system of conveyancing, treating all instruments as mere contracts, in which the intention of the parties is to be arrived at from the language used by them, in connection with the surrounding circumstances, the result in such a deed would be the same, whether the term were reservation or exception, and the distinction stated by the text writers is of no practical importance."
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> *Coal Creek Mining Co. v. Keck,* 83 Tenn. 497.

The truth is the learning on the subject has but little, if any, place in the law of today as between grantor and grantee in a deed of conveyance. As between them the duty of the courts is to effectuate the intention of the parties and that forbids the giving an arbitrary effect to any clause in the deed. When the intent is found it is still referred to by the courts as creating an exception or a reservation, as the case may be, but that is mere matter of classification. The intent is not found by reason of the classification, but the classification, as mere matter of nomenclature, follows the finding of the intent. For col-

lateral purposes, however, the learning is still of consequence, as for instance, a covenant of warranty, of quiet enjoyment, covenants of ownership in insurance policies, and the like, between the grantor and third persons, may have been broken or been observed, accordingly as a particular clause in a deed of conveyance be construed as a reservation or an exception. Most of the cases relied on by defendant will be found to present questions of this latter character.

Third: The conveyances construed in the cases relied on by defendant undertook to convey the soil with an attempted reservation of the right of way. If in those cases the conveyances had been of the right of way, as it existed, with an attempt to reserve to the grantor a right to its use in common, we apprehend the courts would have found no difficulty in construing the attempted reservation as a good and effective reservation in law.

That is the case here, if in fact and in law, Railroad Street was laid out on the right of way of the Railroad Company instead of on land which it owned in fee.

Fourth: The cases laying down the rule of construction contended for by defendant, will all be found to be attempted reservations of known rights of way, existing over land of the grantor, in favor of third persons. Two technical distinctions enforce the rule that in such cases an attempted reservation must

be construed as an exception. One is that the right must be a new right and the other that the right must be reserved to the grantor. If it were possible, however, to conceive of a right of way existing in a grantor, and superimposed on his title in fee, there would be no difficulty in construing his grant, if such was the manifest intention, as a grant of the full fee in the land with a reservation to the grantor of the original right of way. The right reserved would be one inuring to the grantor and it would be one issuing out of the thing granted, since it would be gone by virtue of the grant if not reserved, something that could not be said of a right already existing in a third person.

Fifth: The cases on which defendant relies do not go to the extent of holding that an attempted reservation of an existing right of way must be construed as an exception of the soil covered by the right of way, but merely as an exception of the easement of the right of way over the soil. There may be an exception from the grant of a part of the estate, as well as an exception of a specific part of the soil.

Considered in that light, it is immaterial here whether the language of the dedicatory clause be treated as creating an exception or a reservation. In either case the exception or reservation must be construed in the same way, and the intention of the dedicator reached by the same process of reasoning, that is to say, what was it the grantor intended to except. If the dedicator intended to except from the grant

not the soil of Railroad Street, but the right to use Railroad Street for railroad purposes, it amounts to the same thing precisely as a reservation to use the street for those purposes. In both cases there is a dedication of the street with the right remaining in the grantor to use the street for the purposes indicated in the dedicatory plat.

We call attention in this connection to the well known rule that an exception repugnant to the grant is void. The illustration of the rule usually given is, a grant of twenty acres with an attempt to except one acre. That is said to be void because repugnant. But in a grant of a tract of land by metes and bounds, with an exception of one or more acres, the exception is said to be consistent with the grant and valid. By analogy then in a grant of lots one, two, three, four and five, of a certain block in a town plat, with an exception of lots two and three, the exception would be repugnant to the grant and void. By the same process of reasoning, in the grant of certain named streets to the public in a dedicatory plat (having the effect in this state of a quit claim deed), with an exception of one of the named streets from the dedication, the exception would be repugnant to the grant and therefore void. That is, if the exception be of the soil of the street. If, however, it be the exception of a right or easement in the street, and consistent with the dedication of the street, and with the use of the street by the public, it would not be repugnant and would be upheld as an exception.

We have thus far dealt with the abstract question of reservation or exception. It is necessary now to go a step further and determine if we can the nature and extent of the right reserved to the Railroad Company. That reservation was one to use Railroad Street "for the tracks and use of said Railroad Company."

This cannot be construed to mean any use to which the Company may see fit to put the street. The use to which the Company may put the street must be construed to be one consistent with the maintenance of the street as a street; otherwise the reservation would be void as inconsistent with the dedication.

Elliott on Roads and Streets (3rd Ed.), Section 163 and authorities cited.
13 *Cyclopedia of Law and Procedure,* p. 460 *et seq.*
City of Noblesville v. Lake Erie & W. Ry. Co. (Indiana), 29 N. E. Rep. 484.
State ex rel Grinsfelder v. Street Ry. Co., 19 Wash. 532.
Oklahoma City & T. R. Co. v. Dunham, 39 Texas Civil App. 575; 88 S. W. Rep. 849.

Without considering other uses which may or may not be consistent with the principle last stated, we are concerned here with one proposed use only, namely, the placing in the street of an elevated structure which will occupy practically the entire street and render its use as a street impossible. Manifestly

that cannot be considered as one of the uses authorized by the reservation.

The railroad uses which are consistent with the continuance of the street as a street, are illustrated by the New York elevated railroad cases:

Story v. N. Y. El. R. Co., 90 N. Y. 122.
Lahr v. Met. El. Ry. Co., 104 N. Y. 268; 10 N. E. Rep. 528.
Forbes v. Rome W. & O. R. Co. (N. Y.), 24 N. E. 919.

Also by:

City of Noblesville v. Lake Erie & W. Ry. Co., supra.
Aldis v. Union El. R. Co. (Illinois), 68 N. E. Rep. 95.
Ayers v. Penn. R. Co., 3 Atlantic Rep. 885.

Also by:

Muhlker v. Harlem R. Co., 197 U. S. 544.

The last case is particularly valuable in considering the uses that may be made of Railroad Street under the reservation because it deals with the incidents attaching to public streets which belong to and give value to abutting properties.

It has been asked, of what value can Railroad Street be to abutting properties if the Railroad Company can occupy all of it with its tracks on the surface, and thereby effectually destroy its capability for purposes of travel and of access? It would be a doubtful question if the multiplication of tracks would have the effect stated, whether the Railroad Company could increase its tracks indefinitely, even on the surface, and in that case the better view would be that

it is confined to the tracks shown on the town plat. But the presence of tracks in the street, while it may impair the street for purposes of travel and access, does not destroy the street for those purposes. By paving flush with the tracks inside and outside the rails, Railroad Street would be valuable to the public both for travel and for access to abutting lots, no matter how many switch tracks were laid in the street. But passing all that by and assuming that the Railroad Company may multiply its tracks with the effects stated, there are other incidents of a street than travel and access. Those of light and air are often quite as valuable and important as that of access, as declared by the Supreme Court in the Muhlker case. So that without reference to the surface use of Railroad Street, there are still other uses which attached to abutting property on the dedication of that street and which may not be destroyed without legislative authority and without the making of compensation

As stated by the Court in the Muhlker case:

> "It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as access. There is something of mockery to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the state, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house."

FOURTH.

Did the conduct of the Railroad Company and the public, in the use of the street for a period of nearly ten years, effectuate a common law dedication of the street to the public?

The evidence showing the extent and duration of the use of Railroad Street by the public, with the knowledge and consent of the Railroad Company, was set forth and considered in connection with the question of statutory dedication, and we will not duplicate that part of our brief. We repeat that that evidence establishes the user of Railroad Street by the public, with the knowledge and consent of the Railroad Company, and we now add, by its active procurement, for nearly ten years, or from the 20th day of January, 1881, to the 4th day of August, 1889. The user, to be accurate, was not terminated on the last named date, but it is fixed as of that date because then the great fire occurred, destroying the buildings on Railroad Street along with those on the other streets of the city, and thereafter for several years in building up the city, Railroad Street was cluttered up with building material transported by the Railroad Company, and was more or less obstructed by the Company without much attention being paid to the matter by the public. And soon thereafter, instigated no doubt by the toleration of its conduct during the period of exigency, it conceived the idea of encroaching on the street, on the north side, with warehouses. This encroachment has been gradual, and most of it

has taken place within the last eight or ten years, but nevertheless it is generally referred to as contemporaneous with the fire. However, the encroachment of the warehouses, has left an open space extending from the south front of the warehouses to the south line of Railroad Street, approximately 125 feet in width, and the testimony shows that this open space has always been open, is open to this day, and that it has always been traveled by the public. But leaving all that out of consideration, we say that the user of the street shown between the two dates mentioned, establishes a common law dedication of Railroad Street, even if, by reason of a supposed exception in the plat of Railroad Addition, that street was not dedicated by the statutory plat.

The vital principle underlying dedication is the intent to dedicate,—

Elliott on Roads & Streets (3rd Ed.), Sections 138-39-40-41.

McQuillan on Municipal Corporations, Section 1561 and authorities cited.

> "The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted on by the public, the owner cannot, after acceptance by the public, recall the appropriation."
>
> *Elliott,* Section 138.
>
> "However, the statement that there must

always be an intent to dedicate is not wholly correct, at least if the word *intent* be taken in the sense of an actual intent, inasmuch as the basis of a common law dedication often rests on mere conduct of the owner of land relied on by others to their injury so as to constitute an estoppel *in pais* against the owner, and effectuate a dedication notwithstanding that there was never in the mind of the owner any actual intention to dedicate, the theory being that the owner must intend the reasonable and necessary consequences of his acts."

McQuillan, Section 1561 and note 81.

Intent to dedicate may be shown by user and user need not be for any particular period of time,—

Elliott on Roads & Streets (3rd Ed.), Sections 177 and 178 and authorities cited.

McQuillan on Municipal Corporations, Section 1565.

Dillon on Municipal Corporations (5th Ed.), Section 1081.

The doctrine is thus summed up by Mr. Elliott in section 177 of his work,—

"User by the public may be of importance both as evidence of an intent to dedicate and as evidence of acceptance. Here we are considering it chiefly as evidence of an intent to dedicate, although it may at the same time be evidence of acceptance, and thus of a complete dedication. Some of the English cases have attached too much importance to the element of time, which enters so largely into all questions of dedication. In one case an uninterrupted user of eight years was held sufficient without reference to the question of intention, Lord Kenyon saying, 'During all that time the public at large were permitted to have the free use of the way without impediment whatever, and therefore it is now too late to assert the right, for there is quite a sufficient time

for presuming a dedication of the way to the public. In a great case which was much contested, six years was held sufficient.' In another case the use was for six years, and it was held that made at least a prima facie case of dedication. In still another case the use was for five years, and the Court declared that it precluded the owner from reclaiming the land. There are, however, English cases which assert a different doctrine and refuse to adjudge a dedication unless there has been a use for a very much longer period of time. While it is true that some of the English cases, and perhaps some of the American, have attached undue importance to the element of time, and too little to that of the owner's intention, it is equally true that there are other cases which have refused it that importance which it deserves and have erroneously held that uninterrupted user, no matter what its character, will not sufficiently evidence a dedication unless it has continued for twenty years. The remark of Mr. Woolrych, that, 'It is, therefore, rather the intention of the owner than the question of time which must determine the dedication,' is a correct general statement of the law, but like most general statements, it requires some limitation. It is the rule that there must be evidence of intention, but the user itself may be of such a character as to supply a foundation for an inference of the intention to dedicate. Thus, if the use made of the way is such as could only be rightfully made of a public road or street, and is so open and notorious and so unequivocal in character, and so long continued, also, that the discontinuance of the way would seriously injure the public, the intention to dedicate may be presumed against the owner."

Among the cases cited by Dillon to the proposition last stated is that of Woodyer v. Hadden, 5th Taunt. 125, in which case it was said,

> "No particular time is necessary for evidence of a dedication. If the act of dedication be unequivocal, it may take place immediately. For instance, if a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway."

The facts of this case are so nearly those of the suppositious case put by the Court in 5th Taunton, that the language of the Court may be paraphrased without doing violence to its sense, as, for instance,

> "If a man sells lots on an open space belonging to him, suitable for a street, and permits the same to be built up on each side with houses fronting thereon, the open space is instantly a highway."

A common law dedication may be accepted by user of the public and no definite time is necessary to show such acceptance,—

Elliott on Roads & Streets (3rd Ed.), Sections 170-171.

McQuillan on Municipal Corporations, Section 1582 and notes.

Seattle v. Hinckley, 67 Wash. 276.

It would be tedious and pedantic to cite the multitude of cases collected by the text writers and cited by them to these several propositions. The Court will see when it examines the text books, that the propositions stated by them are amply sustained by the adjudged cases both in this country and in England.

If "the use of this strip of land from 1881 to 1889 was but natural under the circumstances," as

found by the learned Judge below, then the head notes to Hogue v. City of Albina, 10 L. R. A., 673, quoted in the opinion, was quite sufficient to sustain his decision that that use was wholly insufficient to constitute a common law dedication. But if that use was in the highest degree unnatural, except on the theory that the strip of land was intended to be devoted to public use as a street, then the principles to which complainants appeal must prevail, and there was a common law dedication.

On this branch of the case we are not troubled by the dedicatory language attached to the statutory plat. We are considering the case now as if that language excepted Railroad Street from dedication. If there was a later dedication of that street by parol, the case is in the same attitude as if there had been no statutory plat and no exception of Railroad Street therefrom.

No doubt the open and visible use of the street by the Railroad Company during the time that its conduct was ripening into a common law dedication, would impress a continuance of that use on the street; so that we are brought back to the situation created by the statutory dedication, namely, that the Railroad Company retained a right to use the street for railway purposes in a manner not inconsistent with its continued existence as a street.

This brings us to a consideration of the effect of the evidence showing the encroachment of the Rail-

road Company with its warehouses on the north side of Railroad Street, beginning shortly after the fire of 1889 and continuing progressively down to the present time. That evidence was objected to by complainants and was received by the Court subject to the objection. Complainants say that it has no proper place in the case.

First: There either had or had not been a statutory or common law dedication of Railroad Street before the fire, and if there had been either kind of dedication, then subsequent encroachments on the street by the Railroad Company or its lessees was immaterial. After dedication is established the owner cannot impair the same by subsequent acts or declarations. The conduct and declarations which are receivable to rebut dedication are such only as preceded the acquisition of the right,—

Elliott on Roads & Streets (3rd Ed.), Section 186 and authorities cited.

If then the dedication of Railroad Street was complete in 1889, subsequent acts of occupancy of a part of the street by the Railroad Company, can have no influence on the question whether there was or was not a dedication of the street.

Second: No issue of abandonment or estoppel to which such evidence might have been pertinent, was tendered by the answer. Moreover, if any such issue had been tendered, it would have been insuffi-

cient as a bar. It is the settled law of the state of Washington, that mere lapse of time, even with the added incident of payment of taxes, does not legalize an obstruction in a public street,—

West Seattle v. West Seattle Land Company, 38 Washington 359.

The Court in the case last cited in reaching its conclusion relied on the doctrine laid down by Dillon and Elliott, and quoted from the latter as follows:

> "The doctrine that highways cannot be lost by adverse possession is supported by other well settled principles of the law. There can be no rightful permanent private possession of a public street. Its obstruction is a nuisance, punishable by indictment. Each day's continuance thereof is an indictable offense, and it follows, therefore, that no right to maintain it can be acquired by prescription. Municipal corporations have no power to alien or dispose of their streets for any purpose inconsistent with their use as highways. It would be a grave reproach to the law to permit a wrongdoer, one who is daily violating the law of the state itself, to take advantage of his own wrong and that of the municipality, and by such indirect and wrongful means obtain a right to the street which the corporation is prohibited from directly granting or destroying."

See further in support of the position:

Elliott on Roads & Streets (3rd Ed.), Sections 1188, 1189.

Dillon on Municipal Corporations (5th Ed.), Sections 1187 to 1194, and note to 1194.

Third: The encroachments are entirely on the north side of the street, leaving an open space between them and the south side of the street of approximately 125 feet, and it is upon this open space that the addi-

tional encroachment of the elevated structure is proposed to be placed. The properties of three out of the four complainants abut on the south side of the street. It will not be contended, we apprehend, even if the question of estoppel were in the case, that there is any principle which entitles a trespasser in a public street to insist that his partial encroachment on the street should be given the effect of an estoppel against the public or against individuals to complain against further and additional encroachmetns which would completely close up the street.

FIFTH.

Did the ordinance of the city of Spokane, pleaded by defendant, justify the use and occupation of Railroad Street by the defendant, if that street was in fact a public street?

Complainants say not. If the strip of land in question be a street, then the city of Spokane was incapable of authorizing the structure which defendant is proceeding to build,—

State ex rel Schade Brewing Co. v. Superior Court, 62 Wash. 96.

State ex rel Sylvester v. Superior Court, 64 Wash. 594.

Even if it were within the police power of the city to authorize the occupancy of the street with the structure aforesaid, defendant could not proceed without making compensation to abutting owners, and it is immaterial whether the authority was conferred by a permissive or mandatory ordinance,—

Muhlker v. Harlem R. Co., 197 U. S. 544.
McKeon v. N. Y., N. H. & H. R. Co. (Conn.), 61 L. R. A. 730; 53 Atlantic Rep. 656.
McElroy v. Kansas City, 21 Federal Rep. 257.
DeLucca v. City of North Little Rock, 142 Federal Rep. 600.

SIXTH.

Is there legal force in the contention that the city of Spokane is an essential party to the litigation?

The answer alleges that in and by the ordinance pleaded by it, the city is proposing to change the grade of its streets where they cross the railway, and that grade separation is necessary to enable it to do that; and hence, to enjoin the Railway Company from making grade separation is, in effect, to enjoin the change in the grade of the streets. Therefore the city is a necessary party.

These allegations put the cart before the horse. In and by section 8 of the ordinance "the city of Spokane undertakes forthwith upon the acceptance of this ordinance, by the necessary proceedings to legally establish the changes in the grades of the streets, avenues and alleys specified in section 6 hereof."

(Record, p. 48.)

The city merely agrees to establish grades in the cross streets so as to give the clearance provided for in the overhead structure. If the latter be enjoined there will be no necessity for it to carry out the stipulation which it makes with the defendant in and by section 8 of the ordinance.

Moreover, the claim that the defendant is proceeding under a mandatory ordinance of the city is the merest sham and pretense. The defendant drew the ordinance, sent one of its principal officers to Spokane to secure its passage by the City Council, and insisted as a condition of its acceptance that the ordinance be made mandatory in character.

Testimony of George Turner, Record, pp. 277 to 279.

Testimony of Thomas A. Geraghty, Record, pp. 303 to 306.

However, it still desired a loophole of escape, and inserted the following section in the ordinance:

> "Section 23. The Railway Company shall accept the terms and conditions of this ordinance within 45 days after its passage, by filing with the City Clerk of said city of Spokane, a written acceptance of the same, and if not accepted within that time, said ordinance shall be null and void unless further time be expressly given by the City Council."
>
> Record, p. 54.

How an ordinance which may be accepted or rejected at pleasure, can be considered a mandatory ordinance, we leave to defendant to explain.

Even if the ordinance were in fact mandatory, the private corporation is still acting under its corporate power in obeying the public command, and must answer to third persons for its acts or proposed acts,—

Muhlker v. Harlem R. Co., 197 U. S. 544.

McKeon v. N. Y., N. H. & H. R. Co. (Conn.), 61 L. R. A. 730; 53 Atlantic Rep. 656.

Whenever it appears that the change in the grade

of streets is not made solely for the public accommodation, the railroad making it must answer for the consequences,—

Pittsburg, C., C. & St. L. Ry. Co. v. Atkinson (Ind.), 97 N. E. Rep. 353.
Chicago, I. & L. Ry. Co. v. Johnson (Ind.), 90 N. E. Rep. 508.

Parties in the Federal Courts are divided into those that are proper, necessary and indispensable. Proper or necessary parties may be omitted when it would oust the jurisdiction of the Court to join them.

Equity Rule 39.
Simpkins Federal Suit in Equity, 226 *et seq.*
Barney v. Baltimore City, 6 Wallace 284.
Mackay v. Gabel, 117 Federal Rep. 877.

Under the foregoing rule, parties equally interested in the litigation may be omitted, if to join them would oust the jurisdiction, provided decree can be made without prejudice to their rights,—

Hotel Co. v. Wade, 97 U. S. 20.

A party so omitted may come in by petition without ousting the jurisdiction, and this special rule gives force and strength to the general rule,—

Hotel Co. v. Wade, supra.
Simpkins, Section 235.

The following cases illustrate the rule:

Subjecting party defendant to possible double liability,—

Williams v. Bankhead, 19 Wallace, 570.

Omitting one of several distributees of an estate,—

Payne v. Hook, 7 Wallace 431.

Omitting persons connected with others in a chain of title, against whom an action is brought to quiet title,—

N. C. M. Co. v. Westfeldt, 151 Federal 295.

Omitting beneficiary in suit by one to compel another to specifically perform contract for benefit of the beneficiary,—

Rogers v. Penobscot M. Co., 154 Federal 610.

Omitting grantee in a deed sought to be set aside on the ground of fraud in its procurement, where grantee has passed title to a third person, who is made defendant, the allegations of the bill being that the original transaction was for the benefit of the third person,—

Donovan v. Campion, 85 Federal 72.

Omitting other heirs in suit by one heir to set aside will and deed on the ground of fraud,—

Williams v. Crabb, 117 Federal 193.

Omitting grantor as party in suit to set aside grantor's deed.

Mackay v. Gabel, 117 Federal Rep. 877.

California v. So. Pac. Co., 157 U. S. 229, states nothing to the contrary of these decisions. That was a case of original jurisdiction in the Supreme Court. The practice in such cases is governed by the third rule in equity, making former practice in the King's Bench and Chancery outlines for practice in the Supreme Court.

In the following State cases it was held that the city was not a necessary party in suits to enjoin obstruction of streets proceeding under authority of the city,—

State v. Judy, 27 So. Rep. 580.
Florida East Coast Ry. Co. v. Warley, 38 So. Rep. 623.

In the most damaging aspect of the case, it can only be said that the Railway Company is carrying out the mandate of the city, and to that extent represents the city. But it has long been the settled doctrine of the Supreme Court that an agent of the state may be sued alone to enjoin carrying out the void mandate of the state, because a state itself could not be made a party without ousting the jurisdiction of the Court,—

Osborne v. U. S. Bank, 9 Wheaton 738.
Virginia Coupon Cases, 114 U. S. 269.
In re Ayers, 123 U. S. 512.

Complainants respectfully submit that the decree of the lower Court was erroneous, and that they are entitled to the relief prayed for in their several complaints.

Respectfully submitted,

TURNER & GERAGHTY,
POST, AVERY & HIGGINS,

Solicitors for Plaintiffs.

TOWN PLAT
-OF-
RAILROAD ADDITION
Spokane Falls.

The annexed plat contains a description and designation of the Railroad Addition to Spokane Falls in Spokane County Washington Territory laid out by the Northern Pacific Railroad Company in Section 19 Township 25 North Range 43 East of the Willamette Meridian and situated upon the North half of said Section as shown upon said plat

The width of streets and alleys and size of lots and blocks are as designated in the plat and description

The streets shown upon said plat are dedicated to be used by the public until lawfully vacated except the strip of land 250 feet in width designated as Railroad Street which is reserved for the tracks and use of said Railroad Company

John W. Sprague
General Superintendent and Agent
Northern Pacific Railroad Co.

Territory of Washington
County of Spokane SS

Be it remembered that on this 28 day of December AD 1880 before me the undersigned a Notary Public in and for said County and Territory came the Northern Pacific Railroad Company by John W Sprague its duly appointed and constituted agent personally and for and in behalf of the said Northern Pacific Railroad Company Acknowledged the foregoing and annexed town plat of Railroad Addition to Spokane Falls as and for the act and deed of the said Northern Pacific Railroad Company

WITNESS my hand and notarial seal the day and year herein first above written.

E.E. Cooper
Notarial Seal
Washington Territory

E.E. Cooper
Notary Public

Filed and recorded in Record of Town Plats of Spokane County Washington Territory
January 20th 1881

W.H. Bishop
County Auditor

STREET
FIRST
ST.
RAIL ROAD
ST.
SECOND
ST.
ADAMS
JEFFERSON
MADISON
MONROE
LINCOLN
POST
MILL
HOWARD
STEVENS
WASHINGTON

Explanations